Supreme Court, U.S.
FILED
AUG 29 2003
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No. 03-300

(2)

In The

Supreme Court of the United States

SAN DIEGO ASSN. OF REALTORS, ET AL.,

Petitioners,

v.

ARLEEN FREEMAN and JAMES ALEXANDER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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Aug. 28, 2003

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25 pp

QUESTION PRESENTED

Whether, as the Ninth Circuit held, an agreement between joint venturers to set a price for services that are concededly necessary to support their new, pro-competitive product may nevertheless be condemned, under Section 1 of the Sherman Act, as unlawful per se?

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The opinion of the court of appeals, as amended, was published on April 24, 2003 at *Freeman v. San Diego Assn. of Realtors*, 322 F.3d 1133 (9th Cir. 2003). The unamended opinion is found at Pet. App. 1a-35a, with the amendment at Pet. App. 121a-122a. The district court issued an unpublished opinion, reproduced at Pet. App. 36a-78a.

JURISDICTION

Petitioners report they filed their petition for a writ of certiorari on August 22, 2003, within the extended time permitted by Justice O'Connor. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTORY PROVISION

Section 1 of the Sherman Act, 15 U.S.C. § 1, states:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

STATEMENT OF THE CASE

1. Sandicor History and Pre-History

In 1991 there were eleven associations of realtors in San Diego County. Seven in the north operated a single joint venture MLS called the North MLS. The costs for the central computer, software, modems, and staff – the *system* costs – were computed and charged equally to all users of the North MLS. A computer database of homes for sale does not make an MLS: it requires someone to induct new users, teach them how to use the system, and bill them periodically. Therefore, each of the seven north associations provided staff to perform those *support* functions at each association office. Each of the seven north associations independently set its own support prices based on its independently-set support level, staff salaries, overhead costs, and so on. The total price paid by a user of any given north association was the sum of the *system* cost (same for all users) plus *support* cost (which varied for all seven north associations). Thus, the total user cost of the MLS was different at each association. The seven north associations were actual competitors because users had a choice which of the seven associations they bought MLS services from. Services and prices varied between the seven associations, but their homes-for-sale data was identical. The North MLS was legal in every respect.

Three associations in the southern part of San Diego operated a joint venture MLS called the South MLS. It operated in the same manner as the North MLS. The three associations set their support prices independently, resulting in three separate prices for the identical homes-for-sale data in the southern part of San Diego County.

The Coronado association operated its own MLS of data focusing on the expensive homes in the Coronado area of San Diego County. Whereas the North and South MLSs were regional MLSs – involving the joint efforts of several realtor associations – Coronado was not.

Prior to Sandicor's formation, San Diego, the largest association with half the realty agents in the county, charged a support price of $10 per user per month. A weighted average of all eleven associations' pre-Sandicor support prices was about $18[1] per user per month.

Sandicor was the result of the merger of the North, South, and Coronado MLSs.[2] It started operations Jan. 1, 1992, with the data from those three MLSs. Each association continued to provide support services to MLS users: induction, training, and billing. Users made payments with a single check to Sandicor; the price was the sum of Sandicor's system costs per user plus the support price set by the associations.

The price-fixing agreement at the core of this case came about at a meeting on June 17, 1991, just prior to the roll-out of Sandicor. C.A. ER 163-188. The impetus for the price-fixing scheme was the complaining of two financial weaklings from the North MLS: the Fallbrook and Valley Center associations. Their pre-Sandicor support prices were

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[1] The support prices and MLS users in each association are found at C.A. ER 163. The weighted average is found by multiplying the number of users in each association by the support price of that association, by adding those products, and by dividing the sum by the total number of users, 14,267.

[2] Sandicor was technically not a county-wide MLS, since it intentionally excluded the small REBA MLS in the La Jolla area.

nearly $50 per agent per month. Valley Center and Fallbrook protested that if each association continued to set its own prices independently, their users would flock to much lower-priced rivals (i.e., the San Diego association to the south) once Sandicor commenced operations, and they would go out of business. Alkire Declaration, ¶ 34, C.A. ER 968-969. The delegates for the eleven associations decided to fix prices at $25 per MLS user per month, with some of the surplus funds (received as a result of the supra-competitive prices) paid monthly to Fallbrook and Valley Center as a subsidy.

At the June 17, 1991 meeting, the San Diego representatives were unhappy about the price-fixing agreement. They knew their 7,100 users would be overcharged under the proposed price-fixing scheme: 7,100 San Diego users times $15 price-fixed overcharges per month times 12 months per year > $1 million per year in overcharges. However, they accepted the price-fixing agreement because the negotiators all agreed that the price-fixing and subsidies would only last two years. Tyson Declar. C.A. ER 177-178. However, two years later, the prices remained fixed at a high level and the subsidies continued. In early 1994, the San Diego association exploded in anger, writing a letter demanding an end to price-fixing. C.A. ER 320-322. Three months of stormy negotiations and threats followed, and San Diego decided to live with the price-fixing scheme. C.A. ER 343.

Petitioners' first major error is their failure to distinguish between *system* prices (Sandicor's staff, computer, software, overhead costs) and *support* prices (the prices of support of the associations for induction, training, billing), and their implication that respondents complain about Sandicor's system costs that were passed on to MLS users.

Such is not the case. Respondents have never asserted there was anything unlawful about Sandicor's system costs passed on to MLS users. At all times they have complained about the fixed *support* prices.

Petitioners' Question Presented reads, "Whether, as the Ninth Circuit held, an agreement between joint venturers to set a price for services that are concededly necessary to support their new, pro-competitive product may nevertheless be condemned, under Section 1 of the Sherman Act, as unlawful per se?" Petitioners are incorrect in their assertion that respondents "concede" that fixed prices were necessary. While support services and their attendant prices were necessary, it was not necessary that such support prices be fixed. In addition, the question presented fails to distinguish between a situation where a little price-fixing was arguably necessary to get a pro-competitive joint venture off the ground, and continuing price-fixing that had long out-lived its arguable need. Thus, the question presented was a misleading description of the issues in the case, for these reasons, and more presented below.

2. Litigation in the District Court and Court of Appeals

Respondents filed suit for violations of Section One of the Sherman Act because of price-fixing, among other legal theories. The primary defenses of respondents were: (1) the district court did not have subject matter jurisdiction because respondents had not proven sufficient interstate commerce effects, (2) the associations and Sandicor should be considered a single enterprise immune to Sherman Act scrutiny, under *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), and (3) the associations, having

created a pro-competitive MLS, were entitled to compensate themselves with the emoluments of a price-fixing agreement. The district court accepted the second defense, and gave judgment to petitioners.

The court of appeals reversed, holding respondents were subject to Sherman Act scrutiny, and the district court was correct in determining that subject matter jurisdiction was present. The court of appeals also rejected the notion that joint venturers could reward themselves through price-fixing.

3. What was *Not* Litigated in the District Court and Court of Appeals

The petition does not press any of the theories litigated in the lower courts. Instead, petitioners adopt a theory that received only scant attention in either of the lower courts, and is supported by no admissible evidence. Respondents claim that fixing prices at supra-competitive levels was essential both to the formation of Sandicor and the continued operation of Sandicor.

Petitioners do not cite to any evidence in the record to support their assertion that fixing support prices at supra-competitive levels was "essential" to the creation of Sandicor. While argued extensively by respondents in the court of appeals, as here, there was never any evidence in the record to support such assertions. There was much evidence against such an astonishing proposition. For instance, there was evidence of many other regional MLSs that operated successfully without fixing support prices. C.A. ER 101-109. There was testimony by executive officers of the petitioners that they could think of no harm that would befall Sandicor if support prices were not fixed.

C.A. ER 590-592. There was the extensive evidence, described above, that before Sandicor, support prices were not fixed in the North and South MLSs, and they operated successfully. There was evidence that after Sandicor, the operating agreements provided that if any of the associations ceased to be shareholders of Sandicor, that such withdrawing associations would be able to set their support prices independently. C.A. ER 251 ¶ 6.1.4. There was the testimony of two executive officers that they would not have fixed support prices if they had known it was illegal. *See, e.g.*, Alkire, C.A. ER 182.

The only hint of evidence that Sandicor would never have come into being without fixed support prices comes in passing in a 42-page declaration by Anita Alkire, at C.A. ER 955-996. Ms. Alkire was at the June 17, 1991, price-fixing meeting as one of the delegates from the Pacific Southwest Association (then called South Bay). She stated in her declaration, "Sandicor would never have come into existence without providing for the continued existence of the local service centers." C.A. ER 971 ¶ 38:20-21. She also states, "Our decision for Sandicor to charge a fee of . . . at least $25 per user per month seemed necessary for the Boards to be able to continue the combined availability of service center and Board facilities and personnel." C.A. ER 974 ¶ 41:2-7. Respondents objected to that testimony as hearsay, speculation, and without foundation. C.A. ER 1261-1262. In its decision granting summary judgment to petitioners, the district court ruled at ¶ 9, "Plaintiffs' objections to the Declarations of Anita Alkire, June Barlow, John Holley, Diane McMillan, and Mark Marchand are OVERRULED insofar as the Court has relied upon those declarations in its analysis." Pet. App. 77a.

Neither side requested the district court to clarify its ruling. As it reads now, in retrospect, there is an ambiguity. Either the district court overruled the respondents on Ms. Alkire's testimony, and relied on the testimony as admissible, or the district court disregarded Ms. Alkire's testimony as inadmissible. In any event, nothing in the district court's opinion suggests that the district court used Ms. Alkire's testimony on these topics in its analysis. Since the parties were focused on the *Copperweld* defense, and since the district court had made its determination abundantly clear, there was no need for clarification – at that time. But now that petitioners are swerving over to a new theory, a ruling of the district court is required. If the district court sustained the objections of respondents, then petitioners have waived this defense by failing to appeal the evidence ruling. In any event, petitioners have failed to preserve this ground of defense in this Court by failing to obtain a ruling to the objections.

The discussion of the previous several paragraphs dealt only with the *original* need for price-fixing to assist Sandicor in its birth. There was no evidence whatsoever that Sandicor needed ongoing price-fixing of support prices to maintain a successful MLS. Indeed, the contrary evidence just cited was very strong against such an idea.

Other substantial matters were not determined in the lower courts. No damages were determined. Respondents' renewed application for class certification is currently pending. Respondents' application for injunction was referred back to the district court by the court of appeals. The court of appeals referred several other types of price-fixing and restraints of trade back to the district court. In

short, much work needs to be done before the decision in the case is final.

ARGUMENT

1. The Court of Appeals Decision is Interlocutory

The Petition should be denied because the decision of the court of appeals is interlocutory. The court of appeals remanded the case for consideration of such issues as the five *other* types of price-fixing proven by the plaintiffs (Pet. App. 16a, fn. 16), the requested injunction, damages, and class certification.

"[T]his court should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Construction Co. v. Jacksonville, T. & K.R. Co.*, 148 U.S. 372, 384 (1893). "[E]xcept in extraordinary cases, the writ [of certiorari] is not issued until final decree." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). Thus, the lack of finality may "of itself alone" furnish "sufficient ground for the denial of the application." *Id.* In *Brotherhood of Locomotive Firemen v. Bangor & Aroostock R. Co.*, 389 U.S. 327, 328 (1967) this Court denied certiorari "because the Court of Appeals remanded the case [and thus] is not yet ripe for review by this Court." *See, Virginia Military Institute v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring).

To be sure, there have been departures from "the Court's normal practice of denying interlocutory review,"

Estelle v. Gamble, 429 U.S. 97, 115 (1976) (Stevens, J., dissenting), but they tend to be cases of paramount importance with clear-cut answers, factors not present here. *See*, Stern, et al., *Supreme Court Practice, 7th Ed.,* 1993, § 4.18. The Petition should be denied so that the district court, in the first instance, can evaluate the numerous remaining issues and enter a final judgment.

2. There is No Split in Authority Between the Courts of Appeals

Petitioners have mischaracterized the basis of the decision of the court of appeals. That being the case, there is scant reason to examine whether there is any conflict. The court of appeals' decision is correct and does not conflict with the decision of any other court.

The First Circuit, according to petitioners, "has repeatedly held that a price agreement that is 'part of a larger, legitimate economic venture' is not unlawful per se." Petition at 11. Cited for this principle are *Augusta News Co. v. Hudson News Co.*, 269 F.3d 41 (1st Cir. 2001) and *Addamax Corp. v. Open Software Found., Inc.*, 152 F.3d 48, 51-52 (1st Cir. 1998). At the threshold, even taking petitioners' characterization of these authorities at face value, they are entirely inapposite, as the Ninth Circuit concluded quite emphatically that the price-fixing scheme the petitioners applied to their MLS support services was *not* a part, at least not a legitimate, appropriate part, of the county-wide MLS service offered by Sandicor. *See, e.g.*, Pet. App. 23a-24a ("any elements of novelty and cooperation in the MLS are irrelevant to whether support fees are fixed or set competitively"; "fixed support fee is not reasonably ancillary to the combined MLS

database. Defendants offer no explanation for how it improves efficiency of the MLS or has any effect at all beyond raising prices"). In any event, it is quite unlikely the First Circuit, based on *Augusta* and *Addamax*, would resolve this case any differently.

Augusta arose in the wake of the progressive concentration of market power in the magazine distribution industry in Maine, from five distinct firms at the start of the relevant time period to one regional distributor at the end – a joint venture comprised of some, but not all, of the original five firms, along with some preexisting regional distributors. Augusta, in the process, was forced out of business, and sued claiming the joint venture's practice of paying up-front fees to large retail stores in order to procure distribution contracts was a *per se* violation of Section 1. *See generally* 269 F.3d at 42-44. The First Circuit held in favor of the defendants, but its basis for doing so provides scant evidence indeed of any "conflict" with the Ninth Circuit's treatment of the pertinent issues.

The *Augusta* court started out by recognizing that price-fixing was a "classic case" of a *per se* antitrust violation, and qualified that statement only by citing to *Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979) and summing up its holding as follows: "The only price-fixing agreements that are condemned *per se,* with one narrow exception (minimum resale price-fixing), are agreements (1) between competitors (2) as to competing products or services (3) where, in addition, the agreement is not part of a larger, legitimate economic venture." 269 F.3d at 47. It is this passing reference to a "larger, legitimate economic venture" which petitioners take to indicate some doctrinal schism between the First and Ninth Circuits. *See* petition

at 11. Further analysis of petitioners' argument, and the *Augusta* opinion, however, negate that proposition.

Petitioners maintain that the up-front fees were not "strictly necessary" to the joint venture and might well have been "attacked under the rule of reason," but that, because (without more) they were "part of a 'bona fide joint venture,' they could *not, as a matter of law*, be attacked as unlawful per se." Petition at 11 (emphasis in orig.). On analysis, however, *Augusta* provides no support for that proposition. To be sure, it does allow that an otherwise unassailable joint venture may be attacked under the rule of reason if "the venturers . . . impermissibly collaborate beyond the necessary scope of the venture," citing to *Addamax,* 269 F.3d at 48. To read this passage as petitioners do, i.e., to provide that participation in a joint venture, without more, somehow immunizes the venturers from ever being subject to *per se* condemnation, would be patently erroneous, and *Addamax*, in the passage cited by *Augusta*, proves it. *Augusta*'s citation is to footnote five at page 52 of the *Addamax* opinion, which reads in pertinent part:

> *United States v. Topco Associates,* 405 U.S. 596, 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972), would probably be explained today by noting that the anticompetition restraint in question was considerably broader than necessary to make the joint venture work. *Topco,* 1972 WL 669 (N.D.Ill.1972) (on remand), 414 U.S. 801, 94 S.Ct. 116, 38 L.Ed.2d 39 (1973) (affirming judgment).

152 F.3d at 52, n.5. *Topco*, of course, is one of the seminal *per se* cases the effect of which petitioners seek to diminish. *See* Petition at 8, 18-19. But *Addamax*, and *Augusta* through its favorable citation to *Addamax*, do no more than agree with the Ninth Circuit in this case: a restraint

which is supposedly "ancillary" to an otherwise permissible joint venture, but which is "considerably broader than necessary to make the joint venture work," is no less subject to *per se* attack than it would be if it were not somehow connected to a joint venture.[3]

Petitioners' citation to *Addamax* misses the mark for an additional reason: the petitioners have misapplied the case factually, so they end up comparing apples and oranges. *Addamax*, as petitioners note, held "'conduct that is strictly ancillary to [a] productive effort (e.g., *the joint venture's decision as to the price at which it will purchase inputs*) is evaluated under the rule of reason.'" Petition at 12 (emphasis in orig.). True enough, but when petitioners go on to describe this case as one in which they "agreed to a price at which they would 'purchase inputs' – *i.e.*, support services necessary for the new MLS," *id.*, they materially mischaracterize the facts. *Addamax* involved a situation in which a joint venture, pursuant to a process of competitive bidding among third party vendors, arrived at a price it would pay, *see* 152 F.3d at 50; this case involves a situation in which the petitioners, competitors in the MLS support service market, agreed on a price they would charge. That is the essence of horizontal price-fixing,

[3] Viewed in this light, *Augusta*'s suggestion, that impermissible collaboration beyond the necessary scope of a joint venture must needs be evaluated under the rule of reason, appears to be simply erroneous; it is certainly unaccompanied by any analysis which would explain its departure from *Topco* and the favorable citation to *Topco*, on this very issue, by the *Addamax* court. Such judicial pronouncements, at best unreasoned, are not the stuff of which inter-Circuit conflicts justifying discretionary Supreme Court review are made.

recognized in the First Circuit as in others as a classic *per se* violation of § 1.

It is recognized as such in the Seventh Circuit as well. Petitioners cite *Polk Bros., Inc. v. Forest City Enterprises, Inc.*, 776 F.2d 185 (7th Cir. 1985) and *Chicago Prof. Sports Limited Partnership v. Nat'l Basketball Ass'n*, 95 F.3d 593 (7th Cir. 1996) to argue there exists a conflict there as well. Once again petitioners are incorrect.

Polk Bros. involved an agreement between neighboring retailers to refrain from competition while deriving benefits from their complementary inventories. The agreement, held the Seventh Circuit, had to be evaluated under the rule of reason because it was not a "naked" but an "ancillary" restraint: it "may contribute to the success of a cooperative venture that promises greater productivity and output." 776 F.2d at 189. Moreover, the agreement involved "productive cooperation" and one of the two parties "would not have entered into this arrangement . . . unless it received assurances that [the other party] would not compete with it in the sale of products that are the foundation of [its] business." *Id.* at 190.

Chicago Prof. Sports first reaffirmed that "agreements among business rivals to fix prices are unlawful *per se.*" 961 F.2d at 671. It went on to evaluate a National Basketball Association rule limiting the ability of individual teams to sell broadcasting rights to their games under the rule of reason, having found the league, for purposes of discussion, to be a joint venture. *See id.* at 673. Petitioners characterize the case as holding "legitimate collaborative activity is either lawful . . . or else assessed under the Rule of Reason," Petition at 13 (original punctuation omitted);

in petitioner's view there is simply no room for *per se* analysis if a joint venture is involved.

That principle would raise some eyebrows in the Seventh Circuit. In *Premier Electrical Constr. Co. v. Nat'l Electrical Contractors Ass'n, Inc.*, 814 F.2d 358 (1987), the Seventh Circuit (indeed the same judge who authored both *Polk Bros.* and *Chicago Prof. Sports*) emphatically rejected such a doctrinaire view:

> Organization is a precondition to competition; few products are produced by solitary artisans. The appropriate scope of organization may be very hard to establish, and since *BMI* courts have been appropriately modest about their ability to discern the optimal amount of cooperation in an industry. Cases such as *BMI, United States Trotting* [*Assn. v. Chicago Downs Assn.*, 665 F.2d 781 (7th Cir. 1981)], *Rothery* [*Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir. 1986)], and *Polk Bros.* do not eliminate the requirement that there be some productive cooperation as a condition of the application of the Rule of Reason, at least when producers with a high market share agree on price. See *Arizona v. Maricopa County Medical Society,* 457 U.S. 332, 348-52, 102 S.Ct. 2466, 2475-77, 73 L.Ed.2d 48 (1982). The agreement alleged in this case affected 100% of an economically significant market; it was a naked agreement on price; enforcement mechanisms were in place; the free-riding justification given for the agreement does not identify any actor who will protect the consumers' interests and hold the fee to the level justified by the benefits of the Fund. There is no escape from the conclusion of the Fourth Circuit that the agreement is unlawful per se.

The price-fixing cartel here bears these types of earmarks of a *per se* unlawful restraint, according to this Seventh Circuit analysis. The cartel controlled 100% of the market for MLS support services in San Diego County; it expressly set a uniform price for those services; and there was certainly no one looking out for consumers' interests. As the Ninth Circuit noted, in fact, the price was intentionally set at a supra-competitive level, *see* Pet. App. 25a-26a, and there was never the slightest indication of any effort to hold the fee to the level justified by the benefits of the support services in question.

Gen'l Leaseways, Inc. v. Nat'l Truck Leasing Ass'n, 744 F.2d 588 (7th Cir. 1984) also indicates the congruence of the Seventh Circuit's approach with that of the Ninth Circuit. Specifically discussing what it takes for a restraint to be considered legitimately ancillary and thereby eligible for Rule of Reason treatment, the Seventh Circuit distinguished *Broadcast Music* and *NCAA v. Board of Regents*, 468 U.S. 85 (1984) thusly:

> But in this case the organic connection between the restraint and the cooperative needs of the enterprise that would allow us to call the restraint a merely ancillary one is missing. Although some degree of cooperation among members of National Truck Leasing Association in providing reciprocal services may well promote competition in the truck-leasing industry, no reason has been suggested why that cooperation requires that members be forbidden to compete with each other in leasing trucks.

Id. at 595. Similarly here, the degree of necessary cooperation among the petitioners to make an almost county-wide MLS a reality did not extend to the requirement that they

fix prices at which they sold support services to Sandicor. *See* Pet. App. at 23a ("any elements of novelty and cooperation in the MLS are irrelevant to whether support fees are fixed or set competitively"). Not only is this principle discussed in the *General Leaseways'* opinion congruent with Ninth Circuit law, the Ninth Circuit opinion in this very case favorably cites to it more than once. *See,* Pet. App. at 23a-24a, 25a.

Petitioners' essential point is that, so long as it is somehow connected with a legitimate joint venture, any restraint, no matter how repugnant to antitrust law and policy, must be viewed under the rule of reason and can never be condemned *per se*. That view would command no adherence in the Seventh Circuit, which has repeatedly stressed the *per se* approach is to be preserved in appropriate cases:

> So despite the incentive for firms to take free rides on the activities of trade associations, see M. Olson, The Logic of Collective Action (1965), and despite the potential gains from having all affected firms contribute to any benefits the Fund produces, this is not the sort of justification that a court may accept. To do so would abolish the per se rule against horizontal price-fixing.

Premier Electrical, supra, 814 F.2d at 370.

> The per se rule would collapse if every claim of economies from restricting competition, however implausible, could be used to move a horizontal agreement not to compete from the per se to the Rule of Reason category.

Gen'l Leaseways, supra, 744 F.2d at 595. On these points all circuits agree: there is, and ought to be, no magical

force field which will shield any and all restraints from *per se* scrutiny, and the talismanic invocation of "procompetitive joint venture" is, and ought to be, no exception. The petitioners in this case entered into a horizontal price-fixing cartel for which there was no justification logically related to any novel or cooperative feature of the associated joint venture. As all circuits agree, that is *per se* unlawful.

3. The Court of Appeals was Right on the Merits

Petitioners seriously mischaracterize the court of appeals' opinion by claiming the court of appeals failed to apply a rule of reason analysis. In fact, the court of appeals did so, applying the methodical step-by-step evaluation of the restrains proven by respondents (price-fixing) and then assessing the competitive benefits offered to be achieved by such restraints. Finding that no competitive benefits were advanced by the price-fixing, the court of appeals declared that such a result was price-fixing that was illegal *per se*. Thus, the *per se* appellation was not the start of the analysis, but the end.

The court of appeals' analysis of the § 1 claim occurs in three sections at Pet. App. 10a, 16a and 22a. In the first section, beginning at 10a, the court of appeals ruled that price-fixing was a § 1 violation under the Sherman Act. *Id.* at 10a-11a. Next, the court analyzed the defense assertion that the associations had not actually sold anything to the plaintiffs. The court cited *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990) as support for finding that the associations rendered their services to the plaintiffs and other MLS users, being paid by Sandicor. The court of appeals ruled the evidence showed Sandicor had passed on all of the overcharges to the plaintiffs and other

users. *Id.* at 12a. Next, the court of appeals analyzed petitioners' defense under *Illinois Brick Company v. Illinois*, 431 U.S. 420 (1977), and concluded there was "no reasonable possibility" that Sandicor would sue the associations, thereby providing the legal opportunity for plaintiffs to bring their own suit. *Id.* at 13a. Finally, the court concluded that while Sandicor and the associations could set quality standards for the integrity of the MLS database, that flexibility did not provide a justification for fixing prices. *Id.* at 15a-16a. "Sandicor passed on some portion of that inflated support fee to agents, who paid higher prices for the MLS as a result. This is precisely the type of injury the antitrust laws were designed to prevent." *Id.* at 16a.

The second section of the court of appeals' analysis, Pet. App. 16a-22a, involving the immunity claimed by petitioners under *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). Petitioners do not pursue this issue in their petition.

The final section of the court of appeals' analysis occurs at Pet. App. 22a-28a, involving application of the rule of reason.

> Defendants offer three reasons why *BMI* and *NCAA* apply. They first claim that the inherent cooperative aspects of the MLS as a joint venture warrant more deferential review. They next argue that fixing support fees is necessary to realize the "underlying notion of fairness of offering the same services at the same prices to all participants." Finally, they contend that Fallbrook and Valley Center's refusal to join the MLS on a decentralized basis made it necessary to fix support fees if the countywide MLS was to exist at all.

The court of appeals applied *Broadcast Music* and *NCAA* to those three justifications. The court carefully examined the restraints to see if they furthered competitive purposes and found that they did not. "We find all the asserted defenses legally deficient or factually unsupported. The record compels the conclusion that defendants violated section 1 of the Sherman act by fixing support fees. The District Court should have denied summary judgment to defendants and granted it to plaintiffs instead." Pet. App. 28a.

In conclusion, the court of appeals indulged petitioners with what amounts to a rule of reason analysis. Even under that more forgiving standard, petitioners still failed the tests as set forth by this Court. Since the premise of the petition, as set forth in Question Presented, was that petitioners did not get the benefit of a rule of reason analysis of their restraints, and since the court of appeals did, in fact, provide petitioners with such a review, the petition must be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Aug. 28, 2003